IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 529

UNITED STATES, *Petitioner*

v.

CARLO BIANCHI AND COMPANY, INC., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

WILLIAM H. MATTHEWS
Attorney for Respondent

ROBERT F. BRADFORD
ROBERT W. KNOX
Of Counsel

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CITATIONS

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OPINIONS BELOW

The opinion of the Court of Claims of January 14, 1959 is reported at 144 C. Cls. 500. The opinion of the Court of Claims of May 9, 1962 is not yet reported. These opinions appear as an Appendix at pages 15-21 and 52-53 to the Petition for Writ of Certiorari.

The petition in this case is in reality directed at the opinion of the Court of Claims in *Volentine and Little-*

ton v. *United States*, 145 Fed. Supp. 952, decided November 7, 1956,[1] where the Court of Claims sets forth its views with respect to the effect of the Wunderlich Act (Act of May 11, 1954, 68 Stat. 81; 41 U.S.C. Supp. IV, 321-322). Final judgment was rendered for the plaintiff in *Volentine and Littleton* by the Court of Claims in the amount of $44,050.00 on June 12, 1959 but no appeal was taken therefrom.

This is the second attempt of the petitioner to overrule the views of the Court of Claims expressed in *Volentine and Littleton*. This Court previously denied the Government's Petition for a Writ of Certiorari in *Fehlhaber* v. *United States*, 138 C. Cls. 571, certiorari denied, 355 U.S. 877.[2] The reasons assigned by petitioner for granting the writ are similar to those assigned in the *Fehlhaber* petition.[3]

In the *Volentine and Littleton* case, the contract sued upon contained a disputes clause. The plaintiff sued in the United States Court of Claims to recover the extra cost it incurred because of the Government's actions and for remission of liquidated damages, alleging that the decision of the Corps of Engineers Claims and Appeals Board denying its claim had been arbitrary, capricious, fraudulent and not based on substantial evidence. At the trial evidence was offered to support these allegations, but the plaintiff did not offer the transcript of testimony taken before the Board. The Government, without offering testimony of its

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[1] Referred to at page 5 of the Petition.

[2] Referred to at page 6 of the Petition.

[3] Supreme Court U. S. Transcripts of Records, Vol. 143, Case No. 472 (October term, 1957), pp. 5-13.

own, argued that the case should be dismissed because the Court of Claims, under the Wunderlich Act, was limited to a review of the evidence produced before the Board. The Court overruled the Government's position, but granted the Government the opportunity to offer testimony on the merits which the Government elected to do.

The *Volentine and Littleton* decision took the form of a majority opinion of three judges, a concurring opinion which agreed with but supplemented the majority opinion, and one dissenting opinion. The opinion in the present case granting respondent relief is a unanimous opinion written by the same Judge who wrote the opinion in the *Volentine and Littleton* case. As this Court will have to examine the *Volentine and Littleton* decision to understand the majority view of the Court of Claims on the issues involved in the present case, the opinion is printed as an appendix to this brief, *infra*, pp. 1a to 14a.

The *Fehlhaber* case concerned a claim for extra expenses incurred by a contractor as a result of subsurface conditions which were encountered during operations under a construction contract with the Government and which were materially different from those described in the contract drawings and specifications. The contractor's claim before the Appeals Board and before the Court of Claims was based on the changed conditions article of the contract. The transcript of the testimony before the Board was received in evidence by the Court of Claims which rendered its decision for the plaintiff on the basis of testimony taken before the Court.

STATEMENT

Respondent's contract with petitioner calls for the construction of an earthen dam known as Almond Dam across Canacadea Creek, Almond, New York, in accordance with the specifications, schedules and drawings prepared by the Government and made a part of said contract. Included in the contract work was the construction by blasting through rock of a diversion tunnel 710 feet long, horseshoe shape, 13 feet in diameter and completely lined on the outer perimeter with 18 inches of concrete. The contract contained the usual standard clauses inserted in Government construction contracts (Fs. 2, 4, 5; Petition, pp. 21-23).

The contract drawings and Par. TP4-03 of the specifications showed that prior to lining the tunnel with concrete, permanent tunnel protection was to be installed for fifty feet in from each portal, this protection consisting of steel arch ribs with corrugated steel liner plates (F. 6, Petition p. 25).

The specifications and logs of the borings indicated that for the first fifty feet in from the portals weathered rock would be found. Beyond that distance the logs of the borings and the drawings containing the descriptive legends indicated that unweathered rock would be found in the tunnel interior. Weathered rock has fractures and clay and mud seams whereas unweathered rock would not contain clay or mud seams. The Drill Holes shown in the contract drawings beyond fifty feet from each portal indicated unweathered rock. Such rock, if unweathered, would be structurally sound and would not contain vertically intersecting fractures containing clay or mud seams. From this information which petitioner supplied to respondent, petitioner

represented that respondent could expect that rock of unweathered nature would be found throughout the tunnel beyond fifty feet at the portals and that the roof of the tunnel, after holing through, would be sufficiently stable to permit respondent to concrete-line the tunnel without the necessity of first installing permanent tunnel protection beyond fifty feet at the portals. Respondent's bid and petitioner's acceptance of the bid were on this basis (Fs. 38, 42, Petition pp. 16, 47, 49).

Respondent in the performance of its work encountered vertical intersecting fractures containing mud or clay seams throughout the tunnel (F. 34, Petition p. 45). The vertical intersecting fractures containing clay or mud seams found in the tunnel and rock falls which resulted therefrom after the holing through of the tunnel, made it impossible to concrete-line the tunnel without first installing permanent tunnel protection throughout the tunnel. The subsurface conditions encountered differed materially from those which respondent was justified from its examination of the specifications and contract drawings in believing did exist. (F. 42, Petition, pp. 18, 19, 49)

Respondent repeatedly by letter and orally called the conditions heretofore described to the attention of the Resident Engineer and of the Contracting Officer, requesting authorization to install permanent tunnel protection throughout the tunnel at the Government's expense. (Fs. 11, 12, 16, 18, 20, Petition, pp. 29, 30, 32, 34) After a lapse of four and one-half months, from the latter part of March 1947, when the clean up after the holing through was completed, to August 15, 1947, respondent was informed that there would be no objection to the installation throughout the tunnel of the steel ribs and liner plates, but that the costs of such

installation were to be borne by respondent (F. 28, Petition, p. 41).

The Contracting Officer had advised respondent on May 5, 1947 that no further tunnel protection would be placed at the expense of the Government, pointing out respondent's right to appeal from his decision as provided under the terms of Article 15 of the Contract. Respondent filed such an appeal which was heard by the Corps of Engineers Claims and Appeals Board, as the authorized representative of the head of the department on June 17, 1948 (Fs. 22, 47, Petition, pp. 35, 50).

In arriving at its adverse decision the Claims and Appeals Board considered material documents not made known to the respondent at the time of the hearing and not a part of the Board record (Fs. 45, 46; Petition p. 50; Tr. 668-674). These documents were the letters referred to by the Court of Claims in said findings. (Pl's. Exhs. 71, 72, Tr. 545, 546) These letters contained damaging statements which respondent had no opportunity to refute before the Board. It is apparent from the decision of the Board that it considered and relied on the material contained in the letters referred to in the Court of Claims findings (Pl's. Exh. 2).

The Petition herein refers to the fact that of the five prospective witnesses, all of whom were present at the Board trial, only three testified. (p. 4, Footnote 2) The following statement of the Chairman of the Board clearly indicates that the reason the other witnesses were not called to testify before the Board was the Chairman's insistence that the hearing be disposed of in one day (Pl's. Exh. 1, Board Record, p. 29):

> "I would like to have the time division on the two witnesses not to exceed one hour in order that

> Government counsel may have sufficient time to present his case, and that as the time approaches five o'clock we can see the progress of the hearing and in order to avoid carrying it over we will permit appellant's counsel to file a brief, if that is agreeable."

The hearing was held and the decision of the Board was rendered while the work under the contract was still in progress. The work was accepted on behalf of the Government by the Contracting Officer on July 20, 1949 (F. 2, Petition p. 21).

Respondent instituted suit in the Court of Claims to recover the costs of installing steel ribs and liner plates in the diversion tunnel beyond the fifty feet at the portals, and for the additional costs incurred by reason of the delay of the Contracting Officer in authorizing such installation, alleging causes of action arising out of the changed conditions clause of the contract and the Government's breach of its obligations under the contract.

Pursuant to Rule 38(c) of the Court of Claims, the trial was limited to the issues of law and fact relating to the right of respondent to recover, reserving for determination by further proceedings, if necessary, the amount of recovery (F. 3, Petition p. 21). More than 3,000 pages of testimony were taken before the Court of Claims. The trial was not restricted to the "administrative record." The transcript of the testimony before the Board was received in evidence by the Court of Claims as plaintiff's Exhibit 1. Final judgment on the liability issue was rendered for respondent on January 14, 1959.

The Court held that respondent was entitled to an equitable adjustment for the cost of installing perma-

nent supports in the tunnel and that respondent was entitled to recover damages for delays in the performance of the work caused by the failure and refusal of the Contracting Officer to authorize the installation of steel arch ribs and liner plates. (Petition, pp. 18-21)

The Court of Claims stated in its opinion on the liability issue:

> "The Government claims finality for the decision of the Contracting Officer, affirmed by the Claims and Appeals Board. Under the Act of May 11, 1954, 68 Stat. 81, the "Wunderlich Act", that decision does not have finality unless it is supported by substantial evidence. We think that on consideration of all the evidence, the contracting officer's decision cannot be said to have substantial support." (Petition, p. 20)

The judgment of the Court of Claims on the issue of damages was entered on May 9, 1962.

QUESTION PRESENTED

Should the Wunderlich Act be interpreted to require the Court of Claims to restrict its inquiry into the finality of decisions arising under the standard form of Government contract disputes clause to the "administrative record" upon which such decisions might have been based, where the announced purpose of Congress in passing that Act was to overcome the decision of this Court in *United States* v. *Wunderlich*, 342 U.S. 98, where the Act re-established the rule that such administrative decisions possessed no finality if fraudulent, arbitrary, capricious, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, all of which standards the Court

of Claims had uniformly applied for many years on the basis of testimony received in open Court?[4]

REASONS FOR DENYING THE WRIT

The Court Should Dismiss the Petition for Writ of Certiorari Since the Petition Was Not Filed Timely

A petition for writ of certiorari must be filed within 90 days after the judgment which is sought to be reviewed. 28 USC § 2101(c). If the petition is not filed timely, the Court has no jurisdiction to entertain it. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 US 206 (1952); *Delphi Frosted Foods Corp.* v. *Illinois Central R.R. Co.*, 342 US 833 (1951); *Dept. of Banking* v. *Pink*, 317 US 264 (1942).

The Court of Claims entered judgment on liability in this case on January 14, 1959, 144 C. Cls. 500. The Government did not petition for writ of certiorari until October 15, 1962, one year and nine months later. The Court of Claims opinion found as follows:

> "Upon the foregoing findings of fact, which are made a part of the *judgment* herein, the court concludes as a matter of law that plaintiff is entitled to recover and *judgment* will be entered to that

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[4] The question posed by the Petition (p. 2), whether the Court of Claims may upset the administrative decision without regard to the substantiating evidence before the administrative authority and solely on the basis of evidence presented in a *de novo* trial to that Court, cannot be decided on the basis of the record made and the decision rendered by the Court of Claims in the present case. The Court of Claims states: "We think that on consideration *of all the evidence*, the contracting officer's decision cannot be said to have substantial support." (Petition, p. 20; emphasis is supplied) The transcript of the evidence and all of the exhibits before the Board were made part of the record before the Court of Claims (Tr. 552-556).

effect. The amount of recovery will be determined pursuant to Rule 38(c)." (Petition, p. 51, emphasis supplied)[5]

The judgment of the Court of Claims on liability decided the issue now sought to be reviewed. The Court of Claims held, in finding liability, that the respondent in this case was entitled to an open court hearing. This judgment as to liability was a "final judgment" under Rule 38(c) of the Court of Claims Rules. It was reviewable by certiorari. This Court has granted certiorari from a Court of Claims judgment on liability before. *Marconi Wireless Tel. Co.* v. *United States*, 320 U.S. 1 (1942); *Central Eureka Mining Company* v. *United States*, 146 F. Supp. 476, cert. granted 352 U.S. 964; see *Caddo Tribe of Oklahoma* v. *United States*, 155

[5] Rule 38(c) of the Court of Claims Rules provides:

(c) Separate Determination of Liability. Upon stipulation of the parties, subject to approval by the Commissioner, or upon order of the Court or the Commissioner, trials may be limited to the issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery and the amount of offsets, if any, for further proceedings.

In any case, whether or not such an order has been entered, where the Court determines that a party is entitled to recover and the amount of the recovery is reserved for further proceedings, the *judgment on the question of the right to recover shall be final*, subject to proceedings had under Rules 53 and 54. Upon entry of any such final judgment on the right to recover, it shall be the duty of the Commissioner to whom the case was referred to proceed with the determination of the amount of recovery and the amount of offsets, if any. The parties may be allowed a reasonable time within which to stipulate or otherwise agree upon a computation. (emphasis supplied)

Rule 50 of the Court of Claims Rules defines "Judgment" to include "any decree or order subject to a petition for writ of certiorari."

F. Supp. 727, 731 (C. Cls. 1957). Thus, the issue upon which review is now being sought was disposed of with reviewable finality by the judgment on liability of January 14, 1959.

The judgment of the Court of Claims entered on May 9, 1962 awarding damages, from which the Government now seeks review,[6] did not affect the reviewable finality of the prior judgment finding liability. *Dept. of Banking* v. *Pink*, 317 U.S. 264 (1942); *Toledo Co.* v. *Computing Co.*, 261 U.S. 399 (1922); *Dickinson* v. *Petroleum Corp.*, 338 U.S. 507 (1949). There was no reconsideration of any of the issues in the first judgment. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co., supra.*

The Government could have and should have sought review on the issues now in question, almost two years ago. At some point the parties have to know that their rights are fixed. This is the purpose for the 90 day limit on petitions for writ of certiorari. The Court of Claims determined finally that there was liability in favor of the respondent, and that there was delay and expense resulting in damages to the respondent. The only question left to be determined by further proceedings was the exact amount of those damages. At this point it was appropriate for the Government to seek review of the correctness of the trial de novo already given the respondent. This is the only issue the Government is now interested in, in their periodic attempt to review the *Volentine and Littleton* decision. A determination of this issue in favor of the Government might have avoided an unnecessary trial on damages.

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[6] The Government's petition for rehearing was denied on July 18, 1962.

Instead there has been a trial on this issue which required 1600 pages of testimony.

The policy against piecemeal litigation is not involved in this case, since it was possible and appropriate for the Government to seek certiorari after the judgment of liability.

Therefore, the Court should deny the petition for writ of certiorari since it was not brought at the appropriate time in this long and protracted litigation, but rather, almost two years after the issue now being questioned was finally decided.

The Wunderlich Act Was Intended to Restore the Standards Employed By the Court of Claims Before the Decision of This Court in United States v. Wunderlich in Determining the Finality of Administrative Decisions and Was Not Intended to Change Its Procedures for Applying Such Standards.

The jurisdiction of the Court of Claims is founded upon the Tucker Act, 28 U.S.C. Section 1491(4) which provides that the Court of Claims shall have jurisdiction to render judgment "upon any claim against the United States * * * (4) founded upon any express or implied contract with the United States * * *." Suits under the Tucker Act involving contract claims against the United States are original proceedings in which the Court of Cairns has always exercised the function of determining the rights and liabilities of the parties on the basis of competent evidence adduced in open court.[1]

The Court of Claims on many occasions has reviewed administrative decisions under the standard disputes

[1] Concurring opinion, *Valentine and Littleton* decision (App., *infra*, p. 6a).

clause which seeks to impress finality upon such decisions.

The Court of Claims in *Valentine and Littleton* said (App. *infra*, p. 2a):

> "Long before the enactment of this statute [Wunderlich Act] this court and the Supreme Court of the United States has made decisions placing important limitations upon the finality provisions written into Government contracts. Cases in which the court conceded that the departmental decision was arbitrary, capricious, so grossly erroneous as to imply bad faith, or was not supported by substantial evidence, were held to be, by logical implication not intended to be covered by the finality provision."

Petitioner admits that prior to the decision of this Court in *United States* v. *Wunderlich*, 342 U.S. 98, no finality attached to the administrative decision if it was arbitrary, capricious, or so grossly erroneous as to imply bad faith or fraud (Petition, footnote 11, p. 10). These tests have been repeatedly applied along with the additional requirement that administrative decisions would not be upheld unless substantial evidence could be found for their support.

In determining whether the administrative decision under a disputes clause was arbitrary, capricious, grossly erroneous, or not supported by substantial

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* Levering and Garrigues Co. v. United States, 71 C. Cls. 739, 757; Mittry, et al. v. United States, 73 C. Cls. 341, 362; Southern Shipyard Corp. v. United States, 76 C. Cls. 468, 480; Albina Marine Ironworks v. United States, 79 C. Cls. 714, 720; McShain v. United States, 83 C. Cls. 405, 409; Ambursen Dam Co. v. United States, 86 C. Cls. 478, 516, 523; H. B. Nelson Construction Co. v. United States, 87 C. Cls. 375, 380, 389; Baruch Corp. v. United States, 92

evidence," the Court of Claims has always followed its established practice of permitting a full hearing, and not one limited to a so-called "administrative record". Likewise, in no case that came before this Court from the Court of Claims was error declared to exist for failure to restrict the inquiry to an administrative record.

There is no indication whatsoever in the decision of this Court in the *Wunderlich* case (342 U.S. 98, 100), that the Court of Claims had erred in basing its findings of fact upon evidence which was clearly outside of the administrative record. The decision of this Court is limited to the ruling that in the absence of fraud the decision of a department head stands.

The Court of Claims in *Volentine and Littleton* said:

> "At the instigation of contractors and their counsel, the statute quoted above [Wunderlich Act] was enacted. Its legislative history shows that, in general, its purpose was to restore the law to what it was generally thought to be before the Supreme

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C. Cls. 571, 585; Hirsch v. United States, 94 C. Cls. 602, 631; Langevin v. United States, 100 C. Cls. 15, 39; DeArmas v. United States, 108 C. Cls. 436, 469; Meltzer v. United States, 111 C. Cls. 389, 486; Newhall-Herkner v. United States, 116 C. Cls. 419, 447; Great Lakes Co. v. United States, 116 C. Cls. 679, 684, 119 C. Cls. 504, cert. den. 342 U.S. 953; Penner Installation Co. v. United States, 116 C. Cls. 550, 563, 567, aff'd. 340 U.S. 898.

[9] Ruff v. United States, 96 C. Cls. 148, 165 (1942); Bein v. United States, 101 C. Cls. 144, 166-167, 168 (1943); Myers Co. v. United States, 101 C. Cls. 41, 53 (1944); Loftis v. United States, 110 C. Cls. 551, 630 (1948); Asheville Contracting Co. v. United States, 110 C. Cls. 459, 500 (1948); Mitchell Canneries, Inc. v. United States, 111 C. Cls. 228, 247, 249 (1948); Wunderlich v. United States, 117 C. Cls. 92, 218 (1950); rev. 342 U.S. 98, 101; Russell H. Williams v. United States, 130 C. Cls. 435, 440 (1955), cert. den. 349 U.S. 938; General Casualty Company v. United States, 130 C. Cls. 520, 534 (1955), cert. den. 349 U.S. 938.

Court's decision in the *Wunderlich* case (App. infra, p. 3a).

* * * * * * * * *

What the Government asks us to do [to restrict the Court of Claims to a review of a so-called administrative record] would run counter to the traditional handling of this problem. As we have said the law as we applied it before the Supreme Court's decision in the *Wunderlich* case was substantially the same as what it is in the 1954 statute. * * * We think that those who agitated for the 1954 Act and the Congress which passed it, intended that, under the statute, we should go on as we had been doing before the Supreme Court's decision." (App. *infra*, p. 4a.)

Congress expressed the purpose of the Wunderlich Act as being: "to overcome the effect of the Supreme Court decision in the case of *United States* v. *Wunderlich* (342 U.S. 98)".[10] Witnesses who appeared before the Congressional Committees testified that the effect of the proposed statute would be to restore the law to substantially what it had been prior to the *Wunderlich* decision.[11] Congress understood that it was restoring the standards of arbitrariness and capriciousness and that it was adopting the standard of substantial evidence. Nor is there any indication in the legislative history that indicates that Congress desired to change the traditional manner in which the Court of Claims

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[10] H.R. Rep. 1380, 83d. Cong., 2d Sess., p. 1.

[11] Hearings Before a Subcommittee of the Committee on the Judiciary United States Senate, 82d. Cong., 2d Sess., 1952, on Finality Clauses on Government Contracts, top p. 66; pp. 57-58. Hearings Before Subcommittee No. 1, Committee on Judiciary, House of Representatives, 83rd. Cong., 1st and 2nd Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, top p. 98.

enforced these standards. H.R. Rep. 1380, 83rd Cong., 2d Sess., after stating that the purpose of the Wunderlich Act was to overcome the effect of the Supreme Court decision in the Wunderlich case quotes the dissenting opinion of Mr. Justice Douglas and of Mr. Justice Reed in that case as follows:

> "* * * But the rule we announce has wide application and a devastating effect. It makes a tyrant out of every contracting officer. He is granted the power of a tyrant, even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. The power granted is seldom neglected.
> The principal of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinancy, irrational conduct and incompetency of an official. The opinion by Judge Madden in this case expresses a revulsion to allowing one man an uncontrolled discretion over another's fiscal affairs. We should allow the Court of Claims, the agency close to these disputes, to reverse an official whose conduct is plainly out of bounds whether he is fraudulent, perverse, captious, incompetent, or just palpably wrong. The rule we announce makes government oppressive. The rule the Court of Claims espouses gives a citizen justice even against his government."

The Report also quotes from the dissenting opinion of Mr. Justice Jackson. It is quite apparent that the dissenting Justices and the House Committee envisioned the continuance of open hearings before the Court of Claims as well as a restoration of the stand-

ards of review of administrative decisions, as the only cure for the Wunderlich decision.

H. Rep. 1380 states at page 4:

> "A principal change which the amendment effects in S. 24 is to restore the standards of review based on arbitrariness and capriciousness. These have long been recognized as constituting a sufficient basis for judicial review of administrative decisions, a reference to capricious action on the part of a Government contracting official with discretionary power of decision being found as early as 1911 in the decision of the Supreme Court in Ripley v. United States (223 U.S. 695). * * *"[12]
>
> "The proposed amendment also adopts the additional standard that the administrative decision must be supported by substantial evidence." * * *

A restoration of "the standards of review based on arbitrariness and capriciousness "which" have long been recognized as constituting a sufficient basis for judicial review of administrative decisions" necessarily embraces the continuance of the testimony in open court procedure heretofore consistently employed to apply such standards. (See cases cited, *supra*, footnotes pp. 13, 14).

It is pertinent to note that the petitioner does not contend that the Court of Claims would be restricted to the 'administrative record' in cases where the plaintiff in the Court of Claims alleged that the administrative decision was faulty because it was fraudulent or

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[12] This Court there said: "But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should not be exercised capriciously or fraudulently but reasonably and with due regard to the rights of both the contracting parties."

capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith.[13] In footnote 9, p. 10 of the Petition, petitioner states that these exceptions are not involved here.

The inference is clear that the additional substantial evidence standard heretofore applied on the basis of testimony taken in open court, is to be accorded the same treatment as the other standards. If there had been any intention on the part of Congress to treat the application of the substantial evidence standard in a manner different from any of the other standards of the Wunderlich law, such intention would have been made manifest in the law itself or at least in the Committee Report.

Petitioner stresses the following quotation from H. Rep. 1380:

> "* * * It is believed that if the standard of substantial evidence is adopted this condition [not affording contractors an opportunity to become acquainted with the evidences in support of the Government's position] will be corrected and that the records of hearing officers will hereafter contain all of the testimony and evidence upon which they have relied in making their decisions."

This portion of the Committee Report is consistent with the view that there is to be an open hearing in the reviewing court to test the Board's decision against the standard of substantial evidence, as well as against the

[13] Such allegations were made in the complaint herein (p. 13). Though the decision of the Court of Claims warrants the conclusion that the continued failure and refusal of the Contracting Officer to install the permanent tunnel protection was arbitrary and capricious, the Court made no such explicit finding. (Opinion, Petition, pp. 19, 20; Fs. 16, 39-41, Petition pp. 32, 48)

standards of arbitrariness, caprice or fraud. The additional standard of substantial evidence is an imperative to the administrative Boards and not a limitation on the review by the Court of Claims. The Committee was concerned with the inadequate hearings before the administrative Boards and the incomplete administrative records there compiled. The additional standard of substantial evidence places the administrative Boards on notice that their decisions should be more carefully reached and should be based upon the evidence before them as shown by the record, since their decisions will now be subjected to a more thorough testing by a reviewing tribunal in open court.

The Act was made applicable to "suits now filed or to be filed" and therefore covered suits where the administrative hearing was held long before the passage of the Act. Respondent's hearing was in June 1948. It is not reasonable to assume that Congress intended to afford a lesser remedy in those instances where the hearings preceded the enactment of the Act, in the absence of specific language declaring such intention.

H. Rep. 1380 further states: (p. 4)

> "After extensive hearings it has been concluded that it is neither to the best interests of the Government nor to the interests of any of the industry groups that are engaged in the performance of Government contracts to repose in Government officials such unbridled power of finally determining either disputed questions of law or disputed questions of fact arising under Government questions, nor is the situation presently created by the *Wunderlich* decision consonant with tradition that *everyone should have his day in Court* and that contracts should be mutually enforcible." (emphasis supplied.)

H. Rep. 1380 indicates that Congress was fully aware of the fact that it was the exception rather than the rule that the "head" of a "department or agency or his duly authorized representative" afforded a contractor a full and fair hearing, and the language of the Report does not warrant the conclusion that Congress intended to deprive a contractor of his "day in Court" by restricting the Court of Claims review to the so-called administrative record.

The traditional "day in Court" affords a full and fair hearing before a duly constituted administrative or judicial tribunal. There is no statutory authority for the administrative decisions, nor a statutory provision for any procedure in making them. The head of a department may make the decision on appeal personally or may entrust anyone else to make it for him."[14]

Congress was informed that while some agencies operated efficiently,[15] others had no procedure for the handling of appeals.[16] Congress was also advised that instances existed where an agency would permit its Board to hear the Contractor's witnesses, after which the Government would produce no witnesses of its own,

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[14] Concurring opinion in *Volentine and Littleton* (App. *infra* p. 3a).

[15] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d. Cong., 2d Sess., on Finality Clauses in Government Contracts, 1952, p. 95.

[16] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, 82d. Cong., 2d Sess., 1952, on Finality Clauses in Government Contracts, pp. 103-104.

Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d Cong., 1st and 2d Sess., 1953-1954, on Review of Finality Clauses in Government Contracts, pp. 15-16.

and the Board would then accept *ex parte* statements from the Government representatives whose decision had been the subject of the appeal, thereby depriving the contractor of the opportunity of cross examination."[17]

These same views are summarized in the opinion of the Court of Claims in *Volentine and Littleton* v. *United States*. The Court of Claims there emphasized that "administrative records" in cases involving contract dispute clauses are "in many cases a mythical entity" without transcript of record; and there exists "no power to put witnesses under oath or to compel the attendance of witnesses or the production of documents"; and that such Boards frequently upon their own initiative make independent inquiries without a contractor being present. (App. *infra*, p. 3a). The Court of Claims further stated that to gather together the pieces of a so-called "administrative record" would be a considerable task which, in many instances, would require the unthinkable procedure of putting the deciding officer on the stand to "ask him what he knew when he made his decision." (App. *infra*, p. 4a)

So, in respondent's hearing before the Board, substantial evidence not shown to or not seen by respondent's attorney before the Board was given consideration by the Board in arriving at its decision. Also, the Board limited the time for presentation of testimony by respondent's witnesses *supra*, p. 6.

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[17] Hearings Before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 83d. Cong., 1st and 2d Sess., 1953-1954, on Review of Finality Clauses of Government Contracts, top p. 16, pp. 78-79.

It is thus apparent that the only way a contractor can have his "day in Court" is on the basis of testimony taken before the Court of Claims.

Congress was fully aware that the Court of Claims in reviewing an administrative decision under the disputes clause never confined itself to the administrative record. A spokesman for the Department of Justice testified before the Committee:

> "We would, however, be vigorously opposed to the employment in such a declaration of such words as 'arbitrary' or 'capricious'."
>
> "Aside from the indefinite nature of the standard which would be so established, *we know from long experience that the Court of Claims would construe these terms to mean that it could substitute its judgment for that of the head of the department in any case it felt so inclined.*
>
> "If you use words like 'arbitrary' and 'capricious', which are completely devoid of substantive meaning and are indefinite in nature, *it will constitute an open invitation to the Court of Claims to do what it has done,* despite the fact that the rule of law was otherwise; that is, to substitute its judgment for that of the head of the department concerned in any case it felt so inclined." (emphasis supplied.)[11]

It is clear that the spokesman for the Department of Justice apprised the Committee that what the Court of Claims had always done was to apply the standards of arbitrariness and capriciousness on the basis of testimony taken in open Court.

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[11] Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, on Finality Clauses in Government Contracts, 1952, top p. 19.

From the foregoing, it is clear that Congress was fully aware not only of the inadequacy of the procedures being followed under the disputes clause by various agencies, but also the manner in which cases involving such clauses were being handled by the Court of Claims.

Had Congress intended to change the jurisdiction of the Court of Claims from jurisdiction over an original proceeding to a strictly appellate proceeding, Congress would have prescribed procedures which the heads of departments or agencies were to follow in arriving at their decisions as it always has done in the past when it desired to vest in a Court a strictly appellate type jurisdiction over administrative decisions.

For example, in the Administrative Procedures Act, 5 U.S.C. Chp. 19, procedures were prescribed which the agencies were to follow in arriving at a decision (Sec. 1006). The right to subpoena witnesses and documents was granted. (Sec. 1005(c)), and provision was made for testimony under oath (Sec. 1006(b)). It was also provided that the usual rules of evidence were to be followed (Sec. 1006(c)). A formal administrative record was required to be prepared, containing both the oral testimony and such documents as were introduced in evidence (Sec. 1006(d)). Section 9 of that Act authorized the Courts to set aside findings of fact where such findings were arbitrary, capricious, in abuse of discretion, or unsupported by substantial evidence "reviewed on the record of an agency hearing provided by statute" (Sec. 1009(e)).

The legislative history behind the Wunderlich Act reveals an unwillingness on the part of Congress to so restrict the jurisdiction of the Court of Claims in con-

tract cases because in the 82d. Congress 2d Session, there was introduced H.R. 6404, that would have amended the Administrative Procedure Act to permit judicial review on appeal of decisions of department heads in disputes arising under Government contract, which bill Congress saw fit to reject. This Bill is referred to in the concurring opinion in *Volentine and Littleton* which also points out the dissimilarity of the Wunderlich Act to other statutes where an appellate type review of administrative action was clearly intended, App., *infra,* pp. 9a, 10a).

Another example of the precision with which Congress acts in conferring appellate jurisdiction is found in the Act of December 29, 1950, 64 Stat. 1129; 5 U.S.C. 1031-1042, inclusive. There Congress gave the Courts of Appeals the right to determine the validity of the orders of the Federal Communications Commission, the United States Maritime Commission and other agencies (Sec. 1032). The Act stipulated that such appeal "shall be heard * * * upon the record of the pleadings, evidence adduced, and proceedings before the agency where the agency in fact had held a hearing * * *" (Sec. 1037(a)). Section 1037, subsection (c) gave a party the right to seek leave of the appellate court to produce additional evidence if material, and if reasonable grounds existed for failure to produce such evidence before the agency.

In enacting the Act of December 29, 1950, 64 Stat. 1129, Congress recognized that hearings must be required by law to afford litigants an adequate remedy. This statute provides that where a hearing is not required by law (as in the case of hearings involving the disputes clause), and a genuine issue of material fact is presented, the appellate court shall transfer the pro-

ceedings to a United States District Court for the district where the petitioner resides for hearing and determination as if such proceedings were originally instituted in the district court (Section 1037(b)). Thus Congress recognized that where a hearing such as one involving the disputes clause is involved, to afford due process, the original jurisdiction of the Court should be invoked.

If Congress desired to provide a similar type of appellate court review under the Wunderlich Act from decisions of the head of the department, it is clear from the foregoing that it knew how to do so. As stated in the concurring opinion in *Volentine and Littleton* (App. *infra*, p. 10a):

> "* * * Congress knew how to legislatively require the making of a record, affording the parties to the dispute administrative due process [their 'day in Court'], and also knew how to make the decision based on such a record reviewable on appeal. A reading of the Administrative Procedures Act and the Indian Claims Commission Act which do precisely that, indicates that it requires considerably more legislation than was indulged in in the Wunderlich Act."

Another clear indication that Congress intended that the Court of Claims should not be restricted to a review of the administrative record is the action of the Congress with respect to the claim of Martin Wunderlich Company that had been disallowed by this Court (117 C. Cls. 92, rev. 342 U.S. 98).

On September 4, 1957, Private Law 85-306, 85th Cong., H.R. 2654 "For the relief of Martin Wunderlich Company" was approved. Congress appropriated $111,539.59 to be paid to that company, representing

the unpaid balance of the judgment on the claim in question (Claim No. 17), as granted by the Court of Claims. In the *Wunderlich* case, on the basis of testimony taken in open court, the Court of Claims had concluded that there was no substantial evidence to support the administrative decision, and that the same was arbitrary and capricious. *Martin Wunderlich, et al.* v. *United States,* 117 C. Cls. 92, 218-219. The legislative history behind Private Law 85-306 for the relief of Martin Wunderlich Company includes Senate Report No. 1153 of the Committee on the Judiciary, 85th Cong., 1st Sess., dated August 28, 1957, which at page 2 indicates that this Private Law was introduced to overcome the effect of the *Wunderlich* decision. The Report, referring to the Wunderlich Act, states:

> "* * * This law *restored the earlier standards of judicial review,* and permits the Court of Claims to set aside administrative decisions on the ground of fraud, including arbitrary or capricious action, and requires that administrative decisions must also be supported by substantial evidence" (emphasis supplied).

In paying a judgment upon which evidence received by the Court of Claims in open Court had been used to set aside an administrative decision, Congress clearly indicated that the Wunderlich Act's restoration of the standards of judicial review embraced an open court hearing.

The Procedure Advocated By Petitioner Would Be Impracticable and Would Confuse the Issues in Contract Cases in the Court of Claims and Delay the Disposition of Such Cases

In *Volentine and Littleton* the Court pointed out that the Government's position would require two trials in many cases. The first trial would be confined to the presentation of the "administrative record" to determine whether, on the basis of what was in that record, the administrative decision was tolerable. If the Court decided that the departmental decision was not final, there would be a second trial on the merits, with all relevant evidence admissible, whether or not it was in the "administrative record". This would be necessary because there is no statutory authority for remand by the Court of Claims." (App. *infra*, pp. 3a, 4a.)

In footnote 3, p. 5 of the Petition, petitioner refers to the comment of Judge Laramore in his dissenting opinion in *Volentine and Littleton* that judicial review be confined to the administrative record unless it is demonstrated that because of the procedure employed by the appeals board the contractor was unable to adequately present his case. Judge Laramore recognizes that a contractor is unable to adequately present his case if the Board has considered evidence not in the record. (App. *infra*, p. 14a.) Under such circumstances a hearing before the Court limited to the "administrative record" would not afford a litigant an adequate remedy to determine whether or not the administrative decision was tolerable. Using, as an example, the present case in which the Board considered material documents not made known to respondent, *supra*, p. 6, had the Board decision not by chance made reference to a figure of $9,000.00 as the amount involved in the appeal, respondent would not have discovered that there was

any such evidence before the Board, and would not have been able to take testimony before the Court of Claims to establish that such evidence was never disclosed to respondent.

Previous reference has been made to petitioner's position that the exceptions relating to the finality of any decision of the head of a department "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith * * *" are not involved here. (Petition p. 10, *supra*, pp. 17, 18.)

Assume, *arguendo*, that this Court should entertain this appeal and remand the present case to the Court of Claims for a determination as to whether or not the decision of the Board was supported by substantial evidence limited to the "administrative record," the Court could and no doubt would following its past practice test the administrative decision by the application of these other standards and in so doing rely on the whole record and such of its findings as relate to such standards. Petitioner might then be faced with another petition for writ of certiorari requesting this Court to determine that the Court of Claims in applying these other standards is restricted to the "administrative record".

In subsequent cases brought by other parties before the Court of Claims, if arbitrariness and capriciousness are alleged, although the Court of Claims would not have an open court hearing in applying the standard of substantial evidence, nevertheless the same evidence that might have been adduced by such a hearing, may still be adduced by the open hearing on the issues of arbitrariness and capriciousness.

The foregoing illustrates the impracticability and confusion of the procedures petitioner would impose on litigants before the Court of Claims.

The Granting of Certiorari in This Case Is Inappropriate Because the Court of Claims, Apart from Applying the Substantial Evidence Standard, Had Original Jurisdiction to Decide the Issues in the Present Case

As hereinabove shown, *supra*, pp. 4, 5, the judgment of the Court of Claims is also supported by its findings indicating that the Government in the contract specifications made mistaken representations, constituting a warranty that subsurface conditions in the tunnel after excavation would be such that the roof of the tunnel would be sufficiently stable to permit respondent to concrete line the tunnel without the necessity of first installing permanent tunnel protection beyond the 50 feet at the portals and that respondent had a right to and did rely on such representations to its damage. This issue concerned a disputed question of law.

If the Government makes a mistaken representation in the specifications as to the character of the work to be done causing the contractor extra expense, this constitutes a breach of contract which makes the controversy not one of fact but one of law. *Hollerbach* v. *United States*, 233 U.S. 165; *United States* v. *Atlantic Dredging Co.*, 253 U.S. 1; *United States* v. *Spearin*, 248 U.S. 132. Congress has denied finality to the administrative decision in such a case. (Wunderlich Act, Section 322)

The decision of the Board holding that there were no changed subsurface conditions encountered by the respondent was based upon the conclusion that the installation of whatever tunnel protection was necessary beyond fifty feet at the portals was within the terms of the contract and consequently within the contract price. The contention of the respondent was that it was entitled to payment over and above the contract price.

for the extra expense it incurred by reason of the necessity for the installation of permanent tunnel protection not called for by the specifications.

As was stated by the court in *Kayfield Construction Corp. v. United States*, 278 F. 2d 217 (2 Cir. 1960):

> "* * * The testimony taken before the Board was undisputed and probed only the question of whether the work done was within the terms of the contract or beyond its scope. Such a dispute calls for an interpretation of the contract and constitutes a question of law. Congress has denied finality to administrative decision in such case and the trial court should have considered the question as one falling within its original jurisdiction. 41 U.S.C.A. § 322. See *McKinnon v. United States*, D. C. Or., 178 F. Supp. 913; *Kenny Const. Co. v. District of Columbia*, 105 U.S. App. D. C. 8, 262 F. 2d 926." (at p. 218)

Since the dispute in the present case involved questions of law, apart from the substantial evidence standard, the Court of Claims was correct in not treating the Board's decision as final and in holding an open hearing to decide the issue.

Similarly, apart from the standard of substantial evidence, the Court of Claims was justified in holding a *de novo* trial to resolve the issues raised by the respondent that the actions of the contracting officer and the Appeals Board were arbitrary and capricious. The Court of Claims was correct in denying finality to the Board's decision since the action of the contracting officer in failing to authorize permanent tunnel protection and that of the Board in failing to grant the respondent a full and fair hearing were arbitrary and capricious.

As heretofore shown, *supra*, p. 18, footnote 13, the decision of the Court of Claims indicates that the action of the contracting officer was arbitrary and capricious although it made no explicit finding to this effect.

The Appeals Board considered and relied on material documents not made to respondent, *supra* p. 6, (Fs. 45, 46, Petition p. 50; Pl's Exhs. 71, 72, Tr. 668, 674). These documents erroneously referred to the amount involved in the appeal before the Board as only $9,000, a trivial amount compared to the actual damages sustained by respondent, so that the Board was not aware of the seriousness of the case. They also stated, that if this claim were paid, it would open the possibility for additional claims for overbreak and contingent items throughout the tunnel. This alone indicates that respondent was denied its right to have its claim decided on its own merits, unshaped by ulterior motives looking toward the possible or probable consequences of the decision. These documents also contained damaging statements purportedly made by Mr. Worsell, the assistant supervisor of the New York State Division of Industrial Safety, Bureau of Mines, who had inspected the tunnel. Since respondent was unaware of these statements, it had no opportunity to challenge them before the Board. After it became apprised of the content of these documents while preparing for trial before the Court of Claims, Mr. Worsell was called as a witness and testified on behalf of respondent.

It is pertinent to note that in none of the cases cited by petitioner as being in conflict with the Court of Claims decision in the present case, were there allega-

tions of arbitrariness and capriciousness.[19] In *McKinnon* v. *United States*, 178 F. Supp. 913, reversed on other grounds, 289 F. 2d 908, cited by petitioner (Petition p. 9) the Court indicated that if fraud or caprice had been alleged it might have been required to take additional testimony. See also *U.S. National Bank of Portland* v. *United States*, 178 F. Supp. 910, 912, where the Court held that additional testimony was required under such circumstances.

The decisions of the circuit courts and of the district courts cited by the petitioner, are distinguishable from the decision in the present case in that unlike the district courts, no statutory authority exists for the remand by the Court of Claims to any one of the appeals boards for further proceedings. This distinguishing feature was urged by the Government in *Mann Chemical Laboratories, Inc.* v. *United States*, 174 F. Supp. 563, where the Court after referring to the *Fehlhaber* and the *Volentine and Littleton* cases, said at page 565:

> "The Government urges this Court to depart from the decisions cited above and distinguishes them on the ground they were both cases in the Court of Claims which has power only to award damages and cannot remand a case for correction of errors in the record or for further hearings."

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[19] The decisions in *Wells and Wells, Inc.* v. *United States*, 269 F. 2d 412, 415 (C.A. 8) and *Hoffman* v. *United States*, 276 F. 2d 199, 201 make specific reference to the fact that no such contention was therein involved.

CONCLUSION

It is respectfully submitted that for the reasons stated, the petition for a writ of certiorari should be denied.

WILLIAM H. MATTHEWS
Attorney for Respondent

ROBERT F. BRADFORD
ROBERT W. KNOX
Of Counsel

November 15, 1962

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 62-54

(Decided November 7, 1956)

VOLENTINE AND LITTLETON, CONTRACTORS, A PARTNERSHIP, COMPOSED OF M. O. VOLENTINE AND EARL LITTLETON, v. THE UNITED STATES

Mr. Ras Priest for the plaintiff.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

OPINION

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff partnership had a contract with the Government to clear the timber from the site of the reservoir which was to be created by the Whitney Dam on the Brazos River in Texas. It sues to recover alleged extra costs which it incurred because of the Government's action, and liquidated damages assessed against it by the Government. The plaintiff says that while it was performing the contract, the Government closed the dam and thereby inundated the lower part of the plaintiff's work.

The plaintiff's contract contained a provision, lodging in the Government's contracting officer the power to decide disputes arising under the contract concerning questions of fact, giving to the contractor the right to appeal from such decisions to the head of the department, and providing that decisions so arrived at should be final. The contracting officer, upon claims made by the plaintiff, made awards which the plaintiff regarded as inadequate. It appealed to

the head of the department who gave it no further relief. It now sues in this court, alleging that the departmental decision was not final because it was arbitrary, capricious, fraudulent and not based on substantial evidence.

The plaintiff's allegations are obviously intended to place its case within the coverage of the act of May 11, 1954, 68 Stat. 81, 41 U.S.C. (1952 Ed., Supp. II) § 321-322, which says:

> That no provisions of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged; *Provided, however*, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> SEC. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

Long before the enactment of this statute, this court and the Supreme Court of the United States has made decisions placing important limitations upon the finality provisions written into Government contracts. Cases in which the court concluded that the departmental decision was arbitrary, capricious, so grossly erroneous as to imply bad faith, or was not supported by substantial evidence, were held to be, by logical implication, not intended to be covered by the finality provision. But the Supreme Court, in *United States* v. *Wunderlich*, 342 U.S. 98, held that the only situation not

validly covered by the finality clause was that of actual intentional fraud perpetrated by the departmental officials.

At the instigation of contractors and their counsel, the statute quoted above was enacted. Its legislative history shows that, in general, its purpose was to restore the law to what it was generally thought to be before the Supreme Court's decision in the *Wunderlich* case.

In the instant case, the plaintiff introduced, before our commissioner, evidence intended by it to show that the Government had breached its contract, and that there was no substantial support for the departmental decision that it had not done so. The plaintiff then rested.

The Government declined to introduce any evidence in its defense, taking the position that the plaintiff had failed to produce the only piece of evidence which was material at that stage of the case, i.e., the record of the evidence which was before the contracting officer and the head of the department when they made their decisions adverse to the plaintiff. The Government says that one cannot apply the derogatory language which the statute uses to the departmental decision, unless one knows the evidence on which the decision was based, which might have been very different evidence from that presented in this court.

There is logic in the Government's position. But we do not adopt it. It would require two trials in many cases involving this question. The first trial would include the presentation of the "administrative record" and its study to determine whether, on the basis of what was in it, the administrative decision was tolerable. But the so-called "administrative record" is in many cases a mythical entity. There is no statutory provision for these administrative decisions or for any procedure in making them. The head of the department may make the decision on appeal personally or may entrust anyone else to make it for him. Whoever makes it has no power to put witnesses under oath or to

compel the attendance of witnesses or the production of documents. There may or may not be a transcript of the oral testimony. The deciding officer may, and even in the departments maintaining the most formal procedures, does, search out and consult other documents which, it occurs to him, would be enlightening, and without regard to the presence or absence of the claimant.

If we were to attempt to make a decision on the basis of the "administrative record" it would be a considerable task, in many cases, to gather together the pieces of that so-called record and get them all under our eyes at once. A helpful step in doing that would be to put the deciding officer on the stand and ask him what he knew when he made his decision. That step would, of course, be unthinkable.

The second trial referred to above would be the trial on the merits, with all relevant evidence admissible, whether it was in the "administrative record" or not. That trial would be necessary in every case where we decided, on the first trial, that the departmental decision was not final.

What the Government asks us to do would run counter to the traditional handling of this problem. As we have said, the law as we applied it before the Supreme Court's decision in the *Wunderlich* case was substantially the same as what is in the 1954 statute. It was judge-made law instead of legislature-made law. There would have been the same logical reason for dividing such lawsuits into two stages then as now. But it was never done, nor, we think, urged upon the court. We think that those who agitated for the 1954 act, and the Congress which passed it, intended that, under the statute, we should go on as we had been doing before the Supreme Court's decision. If this is a correct assumption, we should not, in order to tidy up the logic of our procedure, introduce new steps which might well have the effect of confusing the issues and delaying their decision.

In cases raising the questions discussed herein, the plaintiff must, in his petition, do more than repeat the deroga-

tory language of the statute. He must allege facts which, if proved, will show that the departmental decision was intolerable, and hence was deprived of finality by the statute. Then there may be cases in which the plaintiff's own proof, before the introduction of any evidence by the Government, will show that the departmental decision, though we might disagree with it, was adequately founded. In such cases the modern substitute for a demurrer to the evidence would stop the case at that stage. In any event, we think that the procedure which worked reasonably well before the statute was enacted, should not now be discarded.

Although, as appears above, the Government declined to introduce any evidence at the hearing before our commissioner, we shall not foreclose it from now introducing evidence, if it wishes to do so. It was seeking to obtain a decision on an important legal question and we will not penalize it for having done so. The case is remanded to the commissioner of this court, who will proceed with it in the regular course.

It is so ordered.

WHITAKER, *Judge*, and JONES, *Chief Judge*, concur.

LITTLETON, *Judge*, concurring:

I am in agreement with the conclusions reached by the majority of the court and with the reasons advanced in support of these conclusions. I should like, however, to suggest some additional grounds for concluding that the act of May 11, 1954, 68 Stat. 81, hereinafter referred to as the Wunderlich Act, does not limit the Court of Claims to a consideration of the evidence produced before the head of a contracting agency in deciding whether a decision rendered by such agency head under the standard contract disputes clause is not final because fraudulent, capricious, arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

The interpretation placed upon the Wunderlich Act by the Government suggests that the statute is a jurisdictional act which might be said to do one of the following things: (1) change the jurisdiction of the Court of Claims in a contract case involving a disputed question of fact from jurisdiction over an original proceeding to an appellate proceeding similar to that provided for in the Indian Claims Commission Act, 60 Stat. 1049, or the Administrative Procedures Act, 62 Stat. 237; (2) change the jurisdiction of the Court of Claims in a contract case to jurisdiction to entertain a petition to review; or (3) change the jurisdiction of this court in contract cases to jurisdiction to render an administrative and not a judicial decision.

I am of the opinion that neither the language of the Wunderlich Act nor its legislative history justifies the conclusion that the jurisdiction of this court in contract claims has been altered in any way. This jurisdiction in contract suits is found in 28 U.S.C. § 1491 (4) which provides that the Court of Claims shall have jurisdiction to render judgment "upon any claim against the United States * * * (4) founded upon any express or implied contract with the United States * * *."

All suits brought under section 1491 are in the nature of original proceedings based on competent evidence adduced by both parties in open court. In claims against the United States founded upon contract it is the function of this court, as it is of any court in private contract litigation, to determine the rights and liabilities of the parties in the light of all the relevant facts and under the terms of the particular contract in suit as interpreted by the court. The problems involved in interpreting the provisions of a Government contract are no different from those involved in interpreting a private contract except that where Congress by legislation has placed some limitation on the particular Government agency's authority to contract, the contract of that agency must be interpreted in the light of any such statutory limitation.

In arguing that Congress in passing the Wunderlich Act intended to limit this court in determining the issue of the finality of the decision of a department head under a disputes provision to a consideration of the "record" on which that department head chose to base his decision, defendant relies heavily on the use of the word "review" and the expression "supported by substantial evidence" in the Wunderlich statute. Defendant also relies on certain references in House Report 1380 on S. 24, to section 10 of the Administrative Procedures Act, and to the decision of the Supreme Court in *Consolidated Edison Co., et al.* v. *National Labor Relations Board et al.*, 305 U.S. 197.

The word "review" when used in statutes does not necessarily imply review in the appellate sense. For example, section 108 of the Renegotiation Act of March 23, 1951, 65 Stat. 7, 21, 50 U.S.C. § 1218, is entitled "Review by the Tax Court;" but the section itself provides for a redetermination of the very issues decided by the Renegotiation Board and not for a review of that Board's decision. See also the various ways in which the word "review" is used in the act of July 19, 1952, 66 Stat. 792, codifying the laws relating to the Patent Office.

While the expression "supported by substantial evidence" appearing in section 1 of the Wunderlich Act is normally found only in statutes conferring appellate jurisdiction or jurisdiction of a petition to review an administrative decision, the use of such expression without more does not amount to a definition of the scope of judicial review. Furthermore, the reference in House Report 1380 to section 10 of the Administrative Procedures Act covering judicial review of decisions of agencies [1] covered by that act does

[1] "Agencies" whose decisions are appealable under the Administrative Procedures Act are only those agencies which are neither parties to, nor employees of parties to, the disputes concerning which the decisions are being rendered. Decisions covered by the Wunderlich Act are decisions rendered by one of the parties to the dispute being decided or by employees of such party.

not warrant our reading into the Wunderlich Act provisions contained in the Administrative Procedures Act but not appearing in the Wunderlich Act.

Section 10 of the Administrative Procedures Act provides that the *findings of fact* supporting the decision under attack on appeal may be set aside by the appellate court if those findings of fact are not supported by substantial evidence. Section 10 then provides that in making the determination that a finding of fact is not supported by substantial evidence, the appellate or reviewing court shall review the whole record or any part thereof which, as earlier provisions of that act require, has been certified to the appellate court as the record on appeal. It is *this* portion of section 10 which defines and limits the "scope of review" by the appellate court and tells the appellate court that in deciding the issue of the finality of the administrative findings of fact it may look only to the record made at the administrative level. The Wunderlich Act contains no such provision telling the Court of Claims what evidence or record it shall consider in making its determination that the *decision* of a department head rendered in a contract dispute lacked finality because arbitrary, or not supported by substantial evidence, etc.

What then is the significance of the reference in the Report of the House Committee to section 10 of the Administrative Procedures Act and to court decisions interpreting that section? It is my opinion that Congress was merely calling attention to the various *standards* of finality provided for in the Wunderlich Act and comparing them with similar standards of finality provided for in section 10 of the Administrative Procedures Act. Nothing in the Committee Report justifies the conclusion that Congress was referring to the manner in which the Administrative Procedures Act requires appellate courts to make their determination as to whether or not those standards have been met. Furthermore, the specific reference to the *Consoli-*

dated Edison Company case, *supra*, was merely for the purpose of noting the Supreme Court's decision of what constitutes substantial evidence, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" as distinguished from a mere scintilla of evidence, and not for the purpose of indicating to the Court of Claims that, although the act if was passing did not specifically so require, the court might look only at the evidence relied on by the department head when the court decided the issue of whether the decision of that department head was or was not arbitrary or supported by substantial evidence.

Under the Administrative Procedures Act it is clear that the appellate court must find the "evidence" referred to in the administrative record which the Administrative Procedures Act itself requires in earlier provisions to be made and to be certified to the appellate court on the appeal. Neither the contract in suit nor any statute of which I am aware, including the Wunderlich Act, requires the making of an administrative record in connection with the rendering of a decision by a department head concerning a dispute arising under the contract. In the generally accepted sense, such an "administrative record" does not exist in connection with any contract claim sued on in the Court of Claims. Congress could have required the making of such an administrative record and some such idea was actually considered by the 82d Congress when it was studying the legislation in question. See H. R. 6404, 82d Cong., 2d Sess., to amend the Administrative Procedures Act to cover decisions rendered in Government contract disputes. In the course of the hearings, suggestions were made concerning the possibility of establishing an independent administrative tribunal to consider disputes arising under Government contracts where decisions would be judicially reviewable on appeal.

Since, presumably, all the facts and circumstances of a contract dispute are within the knowledge of the two con-

tracting parties, the Government contracting party renders its decision on the basis of that knowledge. Congress was aware of the fact that some contracting agency heads delegate their contract obligation to reach a decision on a dispute arising under the contract to a board of employees, and that such a board then attempts to reduce that knowledge to some sort of written record. Congress also knew that other contracting agency heads render their decisions without the aid of any such "record." Congress knew how to legislatively require the making of a record, affording the parties to the dispute administrative due process, and also it knew how to make the decision based on such a record reviewable on appeal. A reading of the Administrative Procedures Act and the Indian Claims Commission Act which do precisely that, indicates that it requires considerably more legislation than was indulged in in the Wunderlich Act.

The dissenting opinion herein, which agrees substantially with the position taken by the defendant, suggests that a plaintiff contractor should be permitted to adduce evidence in this court in addition to evidence produced before the department head *only* upon a showing that adequate opportunity to make a complete record before the department head was not afforded by the contracting agency. When Congress has wished to confer jurisdiction on a court to review a final decision of an executive agency and to provide for the usual appellate review on the basis of a record made below, and in addition has wished to provide for the taking of additional testimony upon a showing by the aggrieved party that, due to no fault of his own, he was unable to produce an adequate record at the agency level, Congress has done so in detail, as in the act of December 29, 1950, 64 Stat. 1129, 5 U.S.C. §§ 1031-1042. See particularly section 7 of that act. I find no such provision in the Wunderlich Act.

Certain bills were introduced in the Congresses which were considering the Wunderlich legislation and which did

purport to change this court's jurisdiction over contract claims. See S. 2432, 82d Cong., 2d Sess.; H.R. 6214, 82d Cong., 2d Sess.; H.R. 6301, 82d Cong., 2d Sess.; H.R. 6338, 82d Cong., 2d Sess.; and H.R. 3634, 83d Cong., 1st Sess., all of which bills proposed amendments to the Judicial Code as it relates to the jurisdiction of the Court of Claims in contract claims.

If the Wunderlich Act does not alter or limit in any way this court's jurisdiction over Government contract claims, what then does it do? It is my opinion that the Wunderlich Act is an express statutory limitation on the right of any Government contracting agency to contract for the absolute finality of its decisions rendered in connection with disputes arising under the contract, whether of fact or of law. Such statutory limitations on the authority of Government contracting agencies become by operation of law a part of any Government contract containing a so-called disputes provision whether the disputes clauses in such contracts contain the statutory language of limitation or not.[2] See *Hoover v. United States*, 218 U.S. 322. The precise limitations imposed on the Government contracting agencies by the Wunderlich Act are the identical ones implied by the courts prior to the decision of the Supreme Court in the *Wunder-*

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[2] In resisting the passage of this legislation, some of the contracting agencies informed the Congress in the course of committee hearings that they were prepared to amend the disputes clauses in their contracts to provide that only those decisions would be final which were not arbitrary, capricious, grossly erroneous, fraudulent or not supported by substantial evidence, and I understand that some disputes clauses now contain that language. Congress, however, noted that without legislation making such limitations on finality mandatory, any Government agency could revert to the old type of disputes clause at any time and that such old standard form disputes language would have to be interpreted by the Court of Claims and the District Courts in conformity with the interpretation of the Supreme Court of that clause in the *Wunderlich* case.

lich case when the courts were called upon to interpret the meaning of the standard form disputes clause which, by its literal language, accorded absolute finality to any sort of decision rendered by a department head on a dispute arising under the contract.

Insofar as the dispute arising under a Government contract involves a question of law, the statutory limitation in the Wunderlich Act amounts to a positive prohibition against the Government's contracting for *any* finality regarding its decisions. Insofar as the dispute involves a question of fact, the Wunderlich Act limits all Government contracting agencies' authority to contract for the finality of their decisions to those decisions which are honest, fair, accurate and supported by all the relevant facts and circumstances involved in the dispute.

I am of the opinion that because the Wunderlich Act is a statutory limitation on the authority of all Government contracting agencies to contract for the finality of their decisions on disputes arising under their contracts, that act leaves unchanged the jurisdiction of this court over Government contract claims. Furthermore, I think the act provides no basis whatsoever for requiring either plaintiff or defendant to produce or rely on the so-called record on which the head of the contracting agency chose to base his decision, required of him under the contract in suit.[1] Insofar as that "record" consists of a transcript of testimony taken before a "board" representing the head of the contracting agency concerned in the dispute, that record is simply "former testimony" which may or may not be

[1] "Administrative records" and "administrative decisions" usually relate to decisions and record which an agency is *by law* required to make. In contract suits in this court the decision of the department head is not required by any statute but rather by the terms of the contract itself and the making of a record to support that decision is purely optional with the department head.

admissible in evidence under the usual rules of evidence as the commissioner of the court may rule on the trial of the case. See *Wong Wing Foo* v. *McGrath*, 196 F. 2d 120. Naturally, if both parties are satisfied with that record and are willing to have the court decide the issue of finality of the decision of the department head on the basis of that record rather than on a new record made in this court, there would seem to be no objection to such a proceeding. See *Langoma Lumber Corp.* v. *United States*, 140 F.Supp. 460, aff'd. 232 F.2d 886.

LARAMORE, *Judge*, dissenting:

I respectfully dissent.

Because of the unsettled nature of this type of controversy, I believe the case should be referred back to a commissioner of this court for further proceedings. However, as a guide to the commissioner and the litigants in this case, I believe a discussion of the finality of the administrative decision intended under the Act of May 11, 1954, *supra*, would be appropriate.

I do not believe that Congress intended by the language in the Act of May 11, 1954, *supra*, "shall be final and conclusive unless the same is fraudulent * * *," to make the decision of the administrative board final subject only to the usual administrative review such as that provided in the Administrative Procedure Act, 60 Stat. 237, because of the lack of procedural due process afforded by the Appeals Board.

However, I believe a common sense application of the Act of May 11, 1954, *supra*, considering the background of the legislation and the administrative procedures available to aggrieved contractors, would be to apply the usual administrative review rule and determine the question of arbitrariness, etc., and lack of substantial evidence on the record made before an appeals board, unless the contractor alleges and proves that because of the procedures available

in the Appeals Board as applied to him, he was unable to adequately present his case. That is to say, because of the failure of the Government to produce documents or witnesses or inability of the plaintiff to compel the attendance of witnesses or other procedures that would prevent plaintiff from adequately establishing material facts with reference to his claim, or if the board considered evidence not in the record. Further, he must allege and prove the additional material facts which were not before the board.

Because of the failure of the plaintiff to put the record of the Appeals Board in evidence, it is impossible for this court to determine whether the decision of the Appeals Board was arbitrary, etc., or not supported by substantial evidence. If the plaintiff desires the court to go beyond the record of the Appeals Board in deciding whether it is entitled to recover, it must amend its petition and allege and prove the facts above outlined.

I would refer the case back to a commissioner of this court in conformity with the above dissenting opinion.